STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN C. KIRBY and CHRISTINA KIRBY,

Plaintiff-Appellants,

v

ROBERT HOLLETT,

Defendant-Appellee.

UNPUBLISHED
March 26, 1999

No. 206101
Monroe Circuit Court
LC No. 96-004883 NO

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Summary disposition was granted in favor of defendant pursuant to MCR 2.116(C)(10) in this negligence action. Plaintiffs[1] appeal as of right, and we affirm.

We review the trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). When there is no factual dispute concerning the purpose for which an individual is on the land of another, the individual's status is a question of law. *Stitt v Holland Abundant Life*, 229 Mich App 504, 505; 582 NW2d 849 (1998).

On a December evening in 1995, plaintiff let his two dogs out of his house. The dogs began chasing something, and ran across defendant's property toward a nearby road. Plaintiff ran after the dogs. As he entered onto defendant's land, he stepped into a snow-covered fence post hole and fell, sustaining injuries.

Plaintiff argues that there was a question as to why he was on defendant's premises, and thus, summary disposition was improper. We find this argument to be disingenuous. Plaintiff claims that he did not enter defendant's land entirely for his own purposes. Plaintiff argues that removing his dogs from defendant's land comported with defendant's wishes and thus, benefited defendant. In the trial court,

plaintiff failed to offer any evidence to support this assertion. In fact, plaintiff's deposition testimony, attached to defendant's motion for summary disposition, clearly belies that plaintiff believed he was on defendant's property to benefit defendant. Plaintiff testified that he was trying to protect his dogs from being injured if they ran into the nearby roadway. He further testified that he was not invited onto defendant's property on the night in question; that he did not enter the property to assist defendant; that defendant had nothing to gain from plaintiff's entry onto defendant's property; and that plaintiff was not on the property for defendant's benefit. There was simply no question of fact concerning the purpose for which plaintiff was on defendant's land.

Plaintiff also argues that the trial court improperly ruled that he was a trespasser as a matter of law because there was an issue of fact as to whether he was a trespasser or a licensee. We disagree that there was a question of fact.

A trespasser is "a person who enters upon another's land, without the landowner's consent." *Wymer v Holmes,* 429 Mich 66, 71 n 1; 412 NW2d 213 (1987). A licensee is "a person who enters on or uses another's premises with the express or implied permission of the owner or person in control thereof." *Alvin v Simpson,* 195 Mich App 418, 420; 491 NW2d 604 (1992), citing *Cox v Hayes,* 34 Mich App 527, 532; 192 NW2d 68 (1971). An example of implied permission is where the owner "acquiesces in the known, customary use of the property." *Alvin, supra,* citing *Thone v Nicholson,* 84 Mich App 538, 544; 269 NW2d 665 (1978). Here, there are no facts to support plaintiff's contention that defendant gave plaintiff implied permission to enter his land[2].

Several years before the incident, which comprises plaintiff's cause of action, defendant and plaintiff, owners of neighboring land, exchanged words regarding defendant's property. Defendant, among other things, told plaintiff to keep his dogs off of defendant's land. There was no evidence or testimony that plaintiff was invited onto defendant's property after that time, or that plaintiff and defendant have spoken to each other since that time. In spite of this, plaintiff claims that he had defendant's implied permission to enter the land. He argues that defendant's order to keep the dogs off of the property was an implied invitation to plaintiff to enter defendant's property to remove the dogs per defendant's wishes. This interpretation is unreasonable. Defendant did not tell plaintiff to remove his dogs whenever they crossed onto his property. He ordered plaintiff to keep his dogs off of the property. No reasonable jury could interpret defendant's words as an implied invitation for plaintiff to enter defendant's land to retrieve his dogs when ever they happened to stray there.

Because there was no evidence that could lead a reasonable jury to conclude that plaintiff was a licensee, or had implied permission to enter defendant's land, and because no record could be developed that would leave open an issue upon which reasonable minds could differ, the trial court properly granted summary disposition, finding that plaintiff was a trespasser as a matter of law.

Defendant next argues, in the alternative, that even if plaintiff was a trespasser, defendant owed him a duty of care. When a landowner is or should be aware of a trespasser's presence, his duty is to exercise ordinary care to prevent injury that arises from active negligence. *Schulke v Krawczak*, 62 Mich App 675, 677; 233 NW2d 694 (1975), citing *Schmidt v Michigan Coal & Mining Co*, 159 Mich 308, 311-312; 123 NW 1122 (1909).

Plaintiff has failed to offer any evidence that defendant had actual knowledge of plaintiff's presence on his land. Moreover, plaintiff has failed to offer evidence that defendant had constructive notice of plaintiff's presence or should have been aware of plaintiff's presence. The testimony revealed that defendant had not seen plaintiff on his property since the somewhat heated exchange several years before. As far as defendant knew, plaintiff came *near* the property line only when he was mowing his lawn, about once a month. In addition, although defendant had seen plaintiff's dogs on defendant's property after 1992, he had not seen them there in the entire year of 1995 preceding the accident. Plaintiff's argument that defendant should have anticipated or foreseen that plaintiff would enter his property is not supported by the evidence[3]. Because there is no evidence that defendant was or should have been aware of plaintiff's presence, he did not have a duty to exercise ordinary care to prevent plaintiff's injury.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Kelly
/s/ Harold Hood

[1] Throughout this opinion, the term plaintiff as used in the singular will apply to Stephen Kirby only.

[2] It is undisputed that plaintiff did not have defendant's express permission to enter his land.

[3] Plaintiff argues that "[a]lthough Mr. Hollett did not want to admit it, and was instructed by his attorney not to respond to the question, he finally conceded that any reasonable person would believe that, from time to time, his or her neighbor might venture along the property line for any number of reasons." The deposition testimony attached to plaintiff's brief does not confirm this statement, nor does any deposition testimony presented to the Court below. In addition, we find that even if defendant had testified consistent with plaintiff's claim, that would not lead to a conclusion that defendant was, or should have been, aware of plaintiff's presence inside the property line.